

FROM: WINSTON &amp; STRAWN LLP

**REMARKS**

Applicants appreciate the courtesies extended by Examiners Adepeju Pearse and Milton Cano during an interview on August 15, 2006 with Applicants' representative, Allan Fanucci. The comments appearing herein are substantially in accord with those presented and discussed during the interview.

Claims 1-10 and 25-33 appear in this application for the Examiner's review and consideration.

Applicants appreciate the withdrawal of the rejection of claim 31 under 35 U.S.C. § 112, first paragraph on page 2 of the Office Action.

Claims 1-4, 8-10, 25, 26, 28, 30, and 32 were rejected under 35 U.S.C. § 103(a) as obvious over U.S. Patent No. 6,235,324 to Luigi Grigoli et al. ("Grigoli") in view of European Patent Application No. EP 0848910 to Kuehl ("Kuehl") for the reasons cited in the previous Office Action.

To further distinguish the present invention from the combination of Grigoli and Kuehl, claim 1 has been amended to recite that (1) the decorative pattern design forms a smooth surface of the outer wall of the shell, (2) the entire packaging sleeve is transparent, and (3) the entire outer surface of the shell is in contact with the packaging sleeve. Support for these changes is illustrated in the drawing figures which show the pattern extending along the entire outer surface of the shell, and in claim 7 which recited the transparent packaging sleeve and contact of the shell with the sleeve. The incorporation of claim 7 into claim 1 overcomes this rejection.

Claims 5-7, 29, and 33 were rejected under 35 U.S.C. § 103(a) as obvious over Grigoli in view of Kuehl as applied to claims 1-4, 8-10, 25, 26, 28, 30, and 32, and further in view of European Application No. EP 276333 to Damato ("Damato") for the reasons cited in the previous Office Action.

Grigoli describes a product in which ice cream is contained inside a chocolate shell, which is inserted in a wafer (Col. 1, lines 5-7). The chocolate shell extends along all the inside surface of the wafer and projects for a certain portion upwardly beyond the wafer (Col. 1, lines 8-11). As acknowledged by the Examiner, Grigoli does not teach that the chocolate shell further includes a pattern design comprising strings of a first semi-solid confection material that form a mesh of strings and a second confection material of a contrasting color to that of the first confection material located between the strings.

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Indeed, there is nothing in Grigoli to even suggest that a pattern design be placed on the chocolate shell. In fact, by inserting his chocolate shell into the wafer, and by positioning the wafer and upper portion of the chocolate shell in a paper envelope, there would be no advantage in appearance of Grigoli's product, since the consumer would only see the envelope or only a portion of the chocolate shell and a wafer cone and not the inner chocolate shell. As discussed, Grigoli's chocolate shell is inserted in the wafer to protect it from the dampness of the ice cream, and preserve its crispness. Grigoli also shows that the ice cream filling is contained within the chocolate shell and does not extend above it and onto the packaging sheet. This is most likely so that should the ice cream melt, it does not flow behind the chocolate layer where it could wet the wafer and make it soggy and unappetizing. This also avoids the ice cream wetting the paper envelope.

Kuehl is cited for its teaching of a chocolate coating having a marbled appearance. There is no suggestion or motivation, however, to combine Grigoli with Kuehl, especially because Grigoli's chocolate shell is mostly hidden inside the wafer. Moreover, Kuehl teaches attractive coatings for ice cream bars, not chocolate cone-shaped products. While Kuehl does teach that stripes can be provided into a mold, there is no packaging sheet employed in that process. In fact, it would take a significant re-design of Kuehl's equipment to provide the presently claimed string pattern. More importantly, the maintenance of a smooth outer surface is not of significance to Kuehl's products. Kuehl is more interested in providing an interesting appearance, but smoothness is incidental and requires an additional step to accomplish. In contrast, Applicants' product is made in a much less complicated manner, with the strings being provided to conform to and be in contact with a packaging sleeve of similar dimensions during formation of the shell so that a smooth outer surface is automatically achieved during formation of the product.

The abstract of Damato teaches a container for receiving an ice cream cone with a lid fitted for closing the conical opening of the container. The container and lid consist of a liquid-tight, partially transparent material to make the package of ice cream visible to the consumer.

As discussed previously, there is no suggestion or motivation to combine Grigoli with Kuehl. Similarly, there is no suggestion or motivation to combine Kuehl with Damato. Damato is concerned with conical ice cream products, not bars. Ice cream bars would not require

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a separate container and lid, as taught by Damato. In addition, Damato also does not appear to teach a chocolate shell, but a wafer cone (*See* FIG. 3).

In the present invention, the packaging sleeve is utilized for multiple purposes: it serves as a mold to enable formation of the confectionery cone and also assures that the outer surface of the chocolate cone is smooth. The different colored confectionery materials can be provided in various arrangements including patterns, messages, even writing in block or script to provide a pleasing and desirable appearance to the outer surface of the cone. This is why in a preferred embodiment the packaging sleeve is transparent, as it enables the message or pattern to be observable to the consumer upon purchase of the product, thus also serving to display the product for purchase. These features are all provided by the structure recited in the present claims, and render these claims patentable over the cited art.

Accordingly, as neither Grigoli, Kuehl, or Damato teach a fat-based shell that has its entire surface in a pattern of at least two different colored confections and with the outer surface of the shell in contact with a transparent packaging sleeve, as presently recited, these claims are not obvious over those references. Thus, the rejection under 35 U.S.C. § 103(a) should be reconsidered and withdrawn.

Claim 27 was rejected under 35 U.S.C. § 103(a) as obvious over Grigoli in view of Kuehl as applied to claims 1-4, 8-10, 25, 26, 28, 30, and 32, and further in view of Japanese Publication JP 2000-118590 to Tanaka et al. ("Tanaka") for the reasons cited in the previous Office Action.

The amendment of claim 1 to incorporate the features of claim 7 also overcomes this rejection.

Claim 31 was rejected under 35 U.S.C. § 103(a) as obvious over Grigoli in view of Kuehl as applied to claims 1-4, 8-10, 25, 26, 28, 30, and 32, and further in view of U.S. Patent No. 5,425,527 to Selbak for the reasons cited in the previous Office Action.

The amendment of claim 1 to incorporate the features of claim 7 also overcomes this rejection.

The claims were provisionally rejected for obviousness type double patenting over the claims of copending applications 10/294,764, 10/385,177, 10/800,222 and 10/984,914. As the provision has not occurred in any of those applications and since the claims of this application are otherwise allowable, these rejections should be withdrawn. To the extent that any


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of these provisions occurs prior to the allowance of this application, applicants will submit an appropriate terminal disclaimer to overcome any obviousness type double patenting rejection.

Accordingly, it is believed that the entire application is now in condition for allowance early notice of which would be appreciated. Should the Examiner not agree, then a personal or telephonic interview is respectfully requested to discuss any remaining issues in order to expedite the eventual allowance of this application.

Respectfully submitted,

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Date

  
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